

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMIE HUFFMAN

v.

REMSTAR INTERNATIONAL, Inc.

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Case No. 4:08-CV-157

Judge Schneider/Judge Mazzant

REPORT AND RECOMMENDATION **OF UNITED STATES MAGISTRATE JUDGE**

Pending before the Court is Plaintiff's Rule 12(b)(6) Motion to Dismiss (Dkt. # 14), and having considered the relevant pleadings, the Court is of the opinion that Plaintiff's motion should be denied.

Plaintiff asserts the following claims against Defendant: (1) sexual discrimination; (2) retaliation; and (3) negligence. On July 11, 2008, Defendant's Original Answer was filed. On February 23, 2009, Plaintiff filed her motion to dismiss Defendant's affirmative defenses.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a claim for failing to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A Rule 12(b)(6) motion is not proper for dismissing a defendant's affirmative defenses. The proper remedy is a motion to strike pursuant to Federal Rule of Civil Procedure 12(f). At least one District Court has construed a Rule 12(b)(6) motion to dismiss affirmative defenses as a motion to strike under Rule 12(f). *See Curry v. High Springs Family Practice Clinic and Diagnostic, Inc.*, 2008 WL 5157683 (N.D. Fla. 2008). Accordingly, this Court will construe Plaintiff's motion as a motion to strike under Rule 12(f).

Under Rule 12(f), the Court may strike an insufficient defense "on a motion made by a party either before responding to the pleading, or, if a response is not allowed, within 20 days after being

served with the pleading.” FED. R. CIV. P. 12(f). Plaintiff’s motion is untimely because it was filed more than twenty days after Defendant filed its answer.

RECOMMENDATION

Pursuant to the foregoing, it is RECOMMENDED that the Plaintiff’s Rule 12(b)(6) Motion to Dismiss should be DENIED.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 22nd day of April, 2009.


AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE